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In the
Supreme Court of the United States
October Term, 1962

No. 77

JOHN R. JONES,

Petitioner

v.

W. K. CUNNINGHAM, JR., SUPERINTENDENT
OF THE VIRGINIA STATE PENITENTIARY,

Respondent

BRIEF AND APPENDIX ON BEHALF OF THE RESPONDENT

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BRIEF ON BEHALF OF THE RESPONDENT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit dismissing the appeal as moot (R. 24-33), is reported at 294 F. 2d 608. The opinion of the United States District Court for the Eastern District of Virginia, Richmond Division, of March 29, 1961 (R. 12-13), is unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on September 14, 1961 (R. 34). The petition for a writ of certiorari was filed on October 26, 1961, and the respondent's Response thereto

was filed on February 14, 1962. Certiorari was granted on March 5, 1962 (R. 35). Petitioner asserts that the jurisdiction of this Court is founded upon 28 U. S. C., §1254(1).

STATUTES INVOLVED

The following provisions of the Code of Virginia will be found in the Appendix: §§53-251, 53-253, 53-255, 53-257, 53-258, 53-259, 53-262, 53-263, 53-264, 53-296, and 53-289 (Uniform Act for Out-of-State Parolee Supervision, Georgia Code §27-2701a). In addition, 28 U. S. C., §2241 and 28 U. S. C., §2254, together with Rule 49(1) of the Rules of the Supreme Court of the United States, and Rule 25(1) of the Rules of the United States Court of Appeals for the Fourth Circuit will also be found in the Appendix.

QUESTIONS PRESENTED

1. Is the petitioner's appeal of an adverse decision in a habeas corpus proceeding rendered moot by virtue of his discharge on parole without the jurisdiction of the District Court?
2. Should this Court direct that the United States Court of Appeals consider the proceeding as an action for a declaratory judgment?

STATEMENT OF THE CASE

On February 2, 1961, John R. Jones (hereinafter called petitioner) filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Virginia, Richmond Division (R. 1-8). On March 1, 1961, respondent filed a Return (R. 9-10). Petitioner attacked the validity of a judgment of the Circuit Court of the City of Richmond, Virginia, of November 18, 1953, wherein petitioner had been ordered to serve ten years in the Virginia State Penitentiary, having been found to be a third-time

offender (see §53-296, Code of Virginia). Petitioner specifically attacked a conviction imposed upon him in the Circuit Court of Chesterfield County, Virginia, on July 8, 1946, for larceny of an automobile. This conviction was one of the three convictions which formed the basis for petitioner's recidivist sentence.

Petitioner alleged that his Chesterfield County conviction (eighteen months in the Penitentiary) was void on the ground that he was not advised of his right to counsel; that he did not waive his right to counsel; that he was financially unable to employ counsel, and that he entered a plea of guilty after a conference with the Commonwealth's Attorney and an FBI agent. It was agreed between the parties present at the conference that certain Federal charges would be dropped, and that a light sentence would be recommended to the Court.

Respondent's Return (R. 9-10) established that, on February 28, 1958, a hearing was held on a similar petition filed by the petitioner in the Circuit Court of Chesterfield County, Virginia, and that the petition was denied and dismissed on August 27, 1958. Respondent attached to his Return a copy of the transcript of the proceedings in the Circuit Court of Chesterfield County, Virginia (Respondent's Exhibit III). An examination of the transcript will reveal that petitioner's uncle was present with him in court on July 8, 1946; that petitioner freely and voluntarily admitted his guilt; entered a plea of guilty and was quite pleased with the light sentence imposed upon him.

The District Court, in a brief opinion (R. 12-13), dismissed the petition on March 29, 1961. On April 6, 1961, the District Judge denied a certificate of probable cause (R. 16). On April 11, 1961, an order was entered in the United States Court of Appeals for the Fourth Circuit granting the certificate of probable cause and permitting petitioner to

proceed in forma pauperis. On April 14, 1961, two eminent attorneys were appointed to represent petitioner.

On June 15, 1962, counsel for the respondent was advised by the Director of the Bureau of Records and Criminal Identification of the Virginia State Penitentiary that the Virginia Parole Board had determined that petitioner was a fit subject for parole. Counsel was further advised that the Parole Board had approved a job offered petitioner and the place where he intended to live, and that petitioner would be released on June 26, 1961, if he accepted the conditions of parole. Counsel immediately notified petitioner's court-appointed attorneys by telephone of this situation. On the following day, June 16, 1962, counsel notified petitioner's attorneys by letter that if petitioner accepted the parole a motion to dismiss the appeal would be filed. Counsel sent a copy of the foregoing communication to the Chief Judge of the United States Court of Appeals for the Fourth Circuit.

On June 22, 1962, counsel for respondent filed a motion to dismiss the appeal on the ground that it would become moot on June 26, 1961, the day on which petitioner would be released from custody (R. 19). The parole agreement will be found in the record on pages 20-21.

This case came on to be heard on June 23, 1962, at which time the motion was argued and counsel were directed to submit memoranda of law in connection with the motion to dismiss. On June 26, 1961, petitioner was paroled, as provided in the parole agreement and went directly to Lafayette, Georgia, to live with his aunt and uncle. Petitioner was to be supervised by the Georgia Parole authorities as provided for by the Uniform Act for Out-of-State Parolee Supervision (§ 53-289, Code of Virginia; § 27-2701a of the Code of Georgia).

On July 3, 1961, petitioner, by counsel, filed a motion to add the members of the Virginia Parole Board as parties

respondent (R. 23). On September 14, 1961, the United States Court of Appeals dismissed the appeal as moot (R. 24-33).

ARGUMENT

I.

Petitioner's Appeal of an Adverse Decision in a Habeas Corpus Proceeding Was Rendered Moot by Virtue of His Discharge on Parole Without the Jurisdiction of the District Court.

Let us examine the history, purpose and scope of the writ of habeas corpus ad subjiciendum which petitioner seeks in this case. Early in the history of the recorded jurisprudence in this country, Chief Justice Marshall, speaking for the Court in *Ex Parte Bollman*, 4 Cranch, 75, 101, observed:

"It has been demonstrated at the bar, that the question brought forward on a habeas corpus, is always distinct from that which is involved in the cause itself. The question whether the individual shall be imprisoned is always distinct from the question whether he shall be convicted or acquitted of the charge on which he is to be tried, and, therefore, these questions are separated, and may be decided in different courts." (4 Cranch 101)

In view of the above language, it would seem that as a necessary prerequisite to the filing of a petition for a writ of habeas corpus ad subjiciendum, the petitioner must demonstrate that he is imprisoned. Moreover, the history of the Great Writ was outlined briefly by Mr. Justice Bradley in *Ex Parte Parks*, 93 U. S. 18, 21:

"The general principles upon which the writ of *habeas corpus* is issued in England were well settled by usage and statutes long before the period of our

national independence, and must have been in the mind of Congress when the power to issue the writ was given to the courts and judges of the United States. These principles, subject to the limitations imposed by the Federal Constitution and laws, are to be referred to for our guidance on the subject. A brief reference to the principal authorities will suffice on this occasion.

"Lord Coke, before the *Habeas Corpus* Act was passed, excepted from the privilege of the writ persons imprisoned upon conviction for a crime, or in execution. 2 Inst., 52; Com. Dig., *Hab. Corp.*, B.

"The *Habeas Corpus* Act itself excepts those committed or detained for treason or felony plainly expressed in the warrant, and persons convict, or in execution by legal process.. Com. Dig., *Hab. Corp.*, B.

"Lord Hale says: 'If it appear by the return of the writ that the party be wrongfully committed, or by one that hath not jurisdiction, or for a cause for which a man ought not to be imprisoned, he shall be discharged or bailed.' 2 Hale, H. P. C., 144.

"Chief Baron Gilbert says: 'If the commitment be against law, as being made by one who had no jurisdiction of the cause, or of a matter for which by law no man ought to be punished, the court are to discharge.' Bac. Abr., *Hab. Corp.*, B. 10.

"These extracts are sufficient to show that, when a person is convict or in execution by legal process issued by a court of competent jurisdiction, no relief can be had. Of course, a superior court will interfere if the inferior court had exceeded its jurisdiction, or was not competent to act." (93 U. S. 21)

In view of the foregoing, it is obvious that the purpose of the writ of habeas corpus is to test the validity of petitioner's imprisonment, commitment or detention by way of legal process. The applicable provision of Federal statute, upon which the jurisdiction of the District Court rests, is codified as 28 U. S. C., §2241, which provides that the

District Court is vested with jurisdiction to issue the writ of habeas corpus within its jurisdiction. It is well settled that the writ of habeas corpus lies only to determine the validity of the petitioner's present detention. *McNally v. Hill*, 293 U. S. 131. This language from the Court's opinion is pertinent herein:

"The purpose of the proceeding defined by the statute was to inquire into the legality of the detention, and the only judicial relief authorized was the discharge of the prisoner or his admission to bail, and that only if his detention were found to be unlawful. In this, the statute conformed to the traditional form of the writ, which put in issue only the disposition of the custody of the prisoner according to law. There is no warrant in either the statute or the writ for its use to invoke judicial determination of questions which could not affect the lawfulness of the custody and detention, and no suggestion of such a use has been found in the commentaries on the English common law. * * *"
(293 U. S. 136-137)

The function of the Great Writ is succinctly stated in the cited case in footnote 2, and the same is set forth below for the reason that it is particularly appropriate to the case at bar:

"The writ, in its historic form, like that now in use in the Federal courts, was directed to the disposition of the custody of the prisoner. It commanded the officer to 'have the body' of him 'detained in our prison under your custody,' 'together with the day and cause of his being taken and detained,' before the judge at a specified time and place 'to do and receive all and singular those things which our said chief justice shall then and there consider of him in this behalf.' 1 Richardson, *The Attorney's Practice in the Court of Kings Bench*, p.

369. Numerous writs, in substantially the same form, used between 5 Edw. IV. and James II., are collected in Tremaine, Pleas of the Crown, 351-435. The earliest of these is reprinted in Coke's Second Institutes, 53. And see Hurd, Habeas Corpus, 232, 233." (293 U. S. 137)

From a review of the foregoing authorities it can only be concluded that in order for the writ of habeas corpus to lie in a Federal court, the Court must have jurisdiction over the petitioner and the respondent, and that the petitioner must be incarcerated.¹

Petitioner, in his brief, has argued that historically the Great Writ lies to test the validity of any type of restraint. Petitioner fails to cite one decision of this Court involving a State prisoner who has been paroled in support of his argument.²

¹ Petitioner quotes this language from *Irvin v. Dowd*, 359 U. S. 394, 404, on page 10 of his brief: "Although the statute has been re-enacted with minor changes at various times the sweep of the jurisdiction granted by these broad phrases has remained unchanged." The Court is referring to § 2241 of Title 28 U. S. C. It is noted that the cited case dealt with the principle of exhaustion of State remedies; that the above quotation is lifted entirely out of context, and that no reference will be found herein to the question of custody, incarceration or detention.

² It is noted that the quotation on page 13 of petitioner's brief is incomplete and the entire sentence is set forth below:

"The purpose of the writ of habeas corpus is to test the right of the court, or other body issuing the writ of arrest, to detain the person for any purpose; and the detention it seems, is sufficient, if it restrain the party of his right to go without question, or, as stated in the English case, cited in *Taylor v. Taintor*, without a string upon his liberty." *Mackenzie v. Barrett*, 141 F. 964, 966).

Taylor v. Taintor, 16 Wall. 366, cited above, was a suit for the return of certain monies forfeited to the State of Connecticut, and did not involve the question of the status of the State parolee in a habeas corpus proceeding.

As shown by the cases heretofore presented to this Court for its consideration, the purpose of the ancient writ of habeas corpus is to prevent the illegal imprisonment of any person, and may issue only when the petitioner is in the physical custody of the person to whom the writ is directed (see III Blackstone's Commentaries, page 129 et seq. (First Edition 1768)). Petitioner premises his entire argument upon the proposition that any restraint beyond that imposed upon civilized society as a whole is sufficient to support an inquiry by way of habeas corpus (see page 14 of petitioner's brief). A careful reading of the first portion of petitioner's argument (pp. 8 through 14 of his brief) fails to disclose one case in support of this theory.

Let us examine the relationship between the petitioner, John R. Jones, now at large in the State of Georgia, and the respondent, W. K. Cunningham, Jr., Superintendent of the Virginia State Penitentiary, at Richmond, Virginia. Petitioner was in the custody of the respondent until June 26, 1961. On that day he was released from the custody of the Superintendent by order of the Virginia Parole Board, as provided for in § 53-264 of the Code. Petitioner was then released from custody and permitted to go to Lafayette, Georgia, as provided for by his parole conditions. The respondent, the Superintendent of the Virginia State Penitentiary at Richmond, has no authority over the petitioner.

If the issues in this case are not moot, as suggested by the petitioner, then what action could the District Court take with reference to W. K. Cunningham, Jr., Superintendent of the Virginia State Penitentiary? Assuming for purposes of argument that the Fourth Circuit had determined that petitioner was entitled to his immediate release from the Virginia State Penitentiary, the Court would have reversed the District Court and issued its mandate. Upon receipt of

the mandate, the District Court would then have issued its order directing that Cunningham release the petitioner. When the order was served upon Cunningham, the most he could have done would have been to put it in his files, for petitioner was no longer in his custody. In essence, the only action which the Court below could have taken would have been to render an advisory opinion. It has long been recognized that courts will not act where there is no subject matter on which the judgment of the court can operate. *Ex Parte Baez*, 177 U. S. 378, 390.

Since petitioner is no longer incarcerated by virtue of the authority of the respondent, what is the petitioner's status today? The Virginia Parole Board is authorized by §53-238(2) of the Code of Virginia to place convicted felons on parole. As hereinbefore explained, §53-264 of the Code of Virginia provides that a person subject to parole shall be released into the custody of the Virginia Parole Board whenever directed by the Parole Board. The parolee is required to comply with the terms of his parole (§53-257 of the Code of Virginia), and is furnished with a copy of the same (R. 20-22). In this case the petitioner has been paroled to the State of Georgia under the terms of the Uniform Act for Out-of-State Parolee Supervision (§53-289, Code of Virginia; §27-2701a, Code of Georgia). Petitioner is presently supervised by Frank Clayton, Parole Supervisor, Chatsworth, Georgia.

Petitioner argues that the conditions of parole are of such character as to constitute a severe restraint upon him and to place him in the category of persons who may seek relief by way of habeas corpus. Petitioner is admittedly under certain restrictions, but it would seem that his counsel have painted a very dark picture of his situation. Indeed, the interpretation placed upon the conditions of parole in

petitioner's brief is not only illogical, but somewhat incorrect (petitioner's brief, page 15). Petitioner does not need his parole officer's permission to leave the physical limits of the Town of Lafayette, Georgia. Petitioner is restricted to the community, which includes the surrounding area. Moreover, if petitioner has a good reason for any request which he submits to his parole officer, the same will be granted.³

It is submitted that the views expressed in petitioner's brief on this point are unrealistic and premised upon a lack of understanding of the parole system. It is assumed that petitioner will not get into any difficulty and will in due course be released from supervision.⁴

Moreover, should petitioner conduct himself in such a manner that he would be arrested as a parole violator, his parole would not be revoked without a hearing. In addition, petitioner's attorney could appear before the Parole Board and present such evidence as he sees fit. Prior to the decision of the United States Court of Appeals for the District of Columbia in *Glenn v. Reed*, 289 F. 2d 462, it was apparently not the practice in the Federal system to permit attorneys to appear at parole revocation hearings in Federal system.

Petitioner cites the following cases on pages 16 and 17 of his brief: *United States v. Dillard*, 102 F. 2d 94; *Escoc v. Zerbst*, 295 U. S. 490; *Washington v. Hagan*, 287 F. 2d 332; *Martin v. United States Board of Parole*, 199 F. Supp. 542. The foregoing cases are not applicable herein for the reason that they do not deal with the Virginia statutes. A determination of the meaning of the Virginia law on the subject is a prerequisite to a decision in the premises. We

³Petitioner has changed jobs, and is presently employed by the Barwick Mills, Lafayette, Georgia.

⁴An examination of the reports filed by the Georgia parole officer indicates that petitioner has been making good progress to date, and that he has not been in any difficulty.

are not here concerned with interpretations placed upon the Federal statutes by the Federal courts. In addition, the hypothetical situation described on page 18 of petitioner's brief is so outlandish that perhaps it should be ignored. It would seem, however, that the foregoing hypothetical situation typifies petitioner's counsel's misunderstanding of the purpose of parole. Parole, in their view, is a situation wherein the parolee is watched like a hawk by his parole supervisor, who will have him clapped into jail should he deviate even the slightest bit from his parole conditions. This is not the true situation at all. The Parole Board's view of the status of a parolee is expressed in the order of release, and we quote the terminal paragraph thereof:

"The Parole Board has released you on parole because it believes that you will be sincere in your efforts to live up to the above conditions and thus benefit yourself as well as the community."

The foregoing is the true view of the status of a parolee. Having clarified the actualities of petitioner's parole, let us examine the legal aspects. Petitioner was released into the custody of the Virginia Parole Board on June 26, 1961, and he was then released from custody. In the eyes of the Parole Board petitioner is no longer in custody. Petitioner is now in Georgia, in conformity with his conditions of parole. Petitioner cites five cases on page 19 of his brief, which he says are in conflict with the decision of the United States Court of Appeals for the Fourth Circuit in the case at bar. Counsel have refrained from an extensive discussion of each case cited in petitioner's brief, for a careful analysis of each of the 113 cases contained therein would not only overburden the body of this brief, but would confuse the

issue even more. Respondent believes, however, that the following cases can be briefly distinguished from the case at bar:

1. *United States v. Fay*, 289 F. 2d 470.

Petitioner was serving a recidivist sentence in the New York penal system, and while his appeal was pending to the Second Circuit Court of Appeals, he was paroled, as provided for in §213 of Chapter 43, McKinney's Consolidated Laws of New York, which reads as follows:

"No prisoner shall be released on parole merely as a reward for good conduct or efficient performance of duties assigned in prison, but only if the board of parole is of opinion that there is reasonable probability that, if such prisoner is released, he will live and remain at liberty without violating the law, and that his release is not incompatible with the welfare of society. If the board of parole shall so determine, such prisoner shall be allowed to go upon parole outside of prison walls and inclosure upon such terms and conditions as the board shall prescribe, but to remain while thus on parole in the legal custody of the warden of the prison from which he is paroled, until the expiration of the maximum term specified in his sentence. As amended L. 1932, c. 457, eff. March 6, 1936."

The Court's decision that petitioner was in custody and that the habeas corpus appeal was not moot, was based on and controlled by the above-quoted statute, which provides that a parolee remains in the legal custody of the warden. There is no such Virginia statute.

2. *United States v. Bradford*, 194 F. 2d 197.

This was a proceeding under 28 U. S. C., §2255 and, of

course, such a proceeding is entirely different from a habeas corpus action brought by a State prisoner.

3. *United States v. Brilliant*, 274 F. 2d 618.

This was also a proceeding brought under 28 U. S. C., §2255. The Court held that although the petitioner had been paroled, he was still in the custody of the Attorney General of the United States, as provided for by 18 U. S. C., §4203, which reads in part as follows:

"Such parolee shall be allowed in the discretion of the Board, to return to his home, or to go elsewhere, upon such terms and conditions, including personal reports from such paroled person, as the Board shall prescribe, and to remain, while on parole, in the legal custody and under the control of the Attorney General, until the expiration of the maximum term or terms for which he was sentenced."

4. *Egan v. Teets*, 251 F. 2d 571.

During the pendency of the appeal petitioner was paroled. The Ninth Circuit Court of Appeals held that it had jurisdiction to determine the issues and cited *Dickson v. Castle*, 244 F. 2d 665, which will be hereinafter discussed.

5. *Dickson v. Castle*, 244 F. 2d 665.

Petitioner, a California prisoner, was unconditionally released during the time the appeal was pending. The Ninth Circuit Court of Appeals held, under *Pollard v. United States*, 352 U. S. 354, that the appeal was not moot. It is important to note that *Pollard* involved a Federal prisoner who brought a proceeding under 28 U. S. C., §2255, which, of course, is not applicable to state prisoners.

From the very brief resume of the foregoing cases it can

be seen that they are not in conflict with the decision of the court below in the instant case. The following decisions of other circuits are in accord with that of the court below:

Johnson v. Eckle, 269 F. 2d 836.

United States v. Ragen, 241 F. 2d 126.

United States v. Cummings, 233 F. 2d 187.

Siercorrich v. McDonald, 193 F. 2d 118.

Adams v. Hiatt, 173 F. 2d 896.

Factor v. Fox, 175 F. 2d 626.

VanMeter v. Sanford, 99 F. 2d 511.

Whiting v. Chew, 273 F. 2d 885.

Petitioner also cites several decisions of the courts of California and Florida in support of his argument that a parolee is in custody and can attack the validity of the sentence from which he has been released on parole. It is noted that the California statute in effect at the time of these decisions (see page 21 of petitioner's brief) provided that a parolee is in the legal custody of the State Board of Prison Directors (California Penal Code, §3056).

The Supreme Court of Florida has held that the writ will lie even though the petitioner is on parole, although there is no statutory authority to support the court's holding (*Sellers v. Bridges*, 153 Fla. 586, 15 So. 2d 293).

The Federal cases listed on page 22 of petitioner's brief in support of the theory that parole is a continuation of custody are, of course, based upon the provisions of 18 U. S. C., §4203 which provides that the parolee remain in the custody of the Attorney General of the United States. For this reason, the cited cases are not pertinent to this inquiry which deals with the parole of a Virginia prisoner under Virginia law.

The fact that some Federal and State courts have held that a prisoner on parole may attack the validity of his com-

mitment is clearly not of importance to the case at bar. The decisions of State courts, cited on pages 25 and 26 of petitioner's brief on this point, are on their facts distinguishable from the case at bar.

It has long been recognized that habeas corpus is an appropriate method for a member of the armed forces to attack the validity of his servitude. Petitioner has cited numerous cases on pages 26 and 27 dealing with such proceedings. These cases are also distinguishable on their facts from the case at bar. There is no comparison between conditions placed on a parolee and the severe restrictions imposed upon a member of the armed forces. A soldier's life is completely controlled by the military authorities. They direct that he wear certain types of clothes; that he arise from his bed at a certain hour; that he live in a certain place and completely control his movements. A soldier is restricted to his base and may not leave unless he receives a pass. A parolee suffers no such restrictions. A soldier's status is one of complete control by military authority, while a parolee's status is predominately one of liberty. There is obviously no comparison between the status of a parolee and the servitude of a slave or indentured servant and, consequently, the cases cited by petitioner dealing with such persons are irrelevant. The cases cited by petitioner deal with aliens and are based on the historical concept of restraint, and require that the person detaining the petitioner produce the body before the court. This is the purpose of the Great Writ.

Up to this point in our argument, we have attempted to distinguish the multitude of citations offered by petitioner in his brief. We shall now bring to the Court's attention those cases which we feel are pertinent, relevant and controlling in the case at bar.

We rely on the decision of this Court in *Weber v. Squier*, 315 U. S. 810, and the per curiam opinion is set forth below:

"The petition for writ of certiorari is denied on the ground that the cause is moot, it appearing that petitioner has been released upon order of the United States Board of Parole and that he is no longer in the respondent's custody. The motion for leave to proceed further herein in forma pauperis is, therefore, also denied."

The following opinions of this Court are controlling herein and because of their brevity, they are set forth in full below:

United States v. Downer, 322 U. S. 756.

"Denied on the ground that the case is moot, it appearing that petitioner is no longer in respondent's custody. *United States, ex rel. Innes v. Crystal*, 319 U. S. 755."

Zimmerman v. Walker, 319 U. S. 744.

"Denied on the ground that the cause is moot, it appearing that Hans Zimmerman on whose behalf the petition is filed has been released from the respondent's custody."

United States v. Crystal, 319 U. S. 755.

"The petition for writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is denied on the ground that the cause is moot, it appearing that petitioner no longer is in respondent's custody."

Tornello v. Hudspeth, 318 U. S. 792.

"The motion for leave to proceed in forma pauperis is granted. The petition for certiorari to the United

States Circuit Court of Appeals for the Tenth Circuit is denied on the ground that the case is moot, it appearing that petitioner has been pardoned by the President and that he is not longer in respondent's custody."

An examination of the foregoing opinions of this Court establishes conclusively that a habeas corpus proceeding is rendered moot by the discharge of the petitioner from the respondent's custody. These cases are controlling in the case at bar for the reason that the petitioner has in fact been discharged from the respondent's custody, and this fact is admitted in petitioner's brief.

The most recent decision of this Court which reaffirms the foregoing principle is *Parker v. Ellis*, 362 U. S. 574, and a portion of that opinion is set forth below:

"Before the case could come to be heard here, the petitioner was released from the state prison after having served his sentence with time off for good behavior. The case has thus become moot, and the Court is without jurisdiction to deal with the merits of petitioner's claim. 'The purpose of the proceeding defined by statute [authorizing the writ of habeas corpus to be issued] was to inquire into the legality of the detention, and the only judicial relief authorized was the discharge of the prisoner or his admission to bail.' *McNally v. Hill*, 293 US 131, 136, 79 L. ed 238, 242, 55 S. Ct 24. 'Without restraint of liberty, the writ will not issue.' *Id.*, 293 US 138. See also *Johnson v. Hoy*, 227 US 245, 57 L. ed 497, 33 S Ct 240. 'It is well settled that this court will not proceed to adjudication where there is no subject matter on which the judgment of the court can operate.' *Ex parte Baez*, 177 US 378, 390, 44 L. ed 813, 817, 20 S Ct 673. We have applied these principles to deny the writ of certiorari for mootness on the express ground that petitioner was no longer in respondent's custody in at least

three cases not relevantly different from the present one. *Weber v. Squier*, 315 US 810, 86 L ed 1209, 62 S Ct 800; *Tornello v. Hudspeth*, 318 US 792, 87 L ed 1158, 63 S Ct 990; *Zimmerman v. Walker*, 319 US 744, 87 L ed 1700, 63 S Ct 1027. In all these cases there was custody as the basis for habeas corpus jurisdiction until the cases reached here. In *Weber*, the respondent's custody ceased because the petitioner had received the benefits of the United States Parole Act. In *Tornello* the petitioner had been pardoned, and was no longer in the custody of anyone. In *Zimmerman* petitioner had been unconditionally released and was also no longer in the custody of anyone. These cases demonstrate that it is a condition upon this Court's jurisdiction to adjudicate an application for habeas corpus that the petitioner be in custody when that jurisdiction can become effective.

"It is precisely because a denial of a petition for certiorari without more has no significance as a ruling that an explicit statement of the reason for a denial means what it says. Accordingly, the writ of certiorari is dismissed for want of jurisdiction." (362 U. S. 575-576)

The foregoing constitutes a succinct statement of the law applicable to the case at bar and it would serve no useful purpose to elaborate on the same.

One matter presented in petitioner's brief demands a few short comments. It has been clearly established that petitioner is not in respondent's custody and, consequently, the writ will not lie. It is argued in petitioner's brief that if the Virginia Parole Board were made parties respondent, the Court could then adjudicate the matter. Assuming for purposes of argument that the members of the Parole Board were made parties respondent. If the case were remanded to the Fourth Circuit directing that the District Court

conduct a hearing, under what stretch of the imagination could the Parole Board be required to produce the petitioner for a hearing? Do counsel for the petitioner suggest that the Parole Board should have petitioner arrested and brought to Virginia for a habeas corpus hearing? This is, of course, absurd. It is true that the Parole Board could have petitioner arrested in Georgia and brought to Virginia, but petitioner has a right to contest the validity of his confinement as soon as he reaches Virginia (*United States v. Lohman*, 228 F. 2d 824). The foregoing is purely speculative and is of little import here.

It is well settled that the petitioner and the respondent must be within the jurisdiction of the District Court. *Ahrens v. Clark*, 335 U. S. 188, 190-191; *Johnson v. Eisentrager*, 339 U. S. 763, 778. Petitioner is not within the jurisdiction of the United States District Court for the Eastern District of Virginia, Richmond Division, and, consequently, the writ will not lie.

A subsidiary question, which is treated very lightly in petitioner's brief, deserves comment. On page 37 of his brief reference is made to Supreme Court Rule 49(1) and to United States Court of Appeals for the Fourth Circuit Rule 25(1). Both of these rules provide that the custody of the prisoners shall not be disturbed pending an appeal in a habeas corpus matter. Counsel for the respondent was not advised of these rules until after petitioner had been released from custody. It would seem that the purpose of these rules is to prevent the transfer of a prisoner without the jurisdiction of the District Court, and not to prevent his release from custody. It is obvious that it is not the intention of these rules to require that a prisoner remain in custody if he is eligible for parole and has been granted parole by the appropriate authorities. Moreover, the release of the petitioner from the custody of the respondent renders

this matter moot by the very language of the rule of this Court and of the Fourth Circuit Court of Appeals.⁵

In summary it is submitted that petitioner has been released from the custody of the respondent; that his status as a parolee does not entitle him to proceed by way of habeas corpus; that petitioner's status is one of freedom, rather than confinement, and that, under the decisions of this Court, the case is moot.

II.

This Case Cannot Be Treated as a Declaratory Judgment Action

On March 5, 1962, this Court entered the following order, which is set forth in its entirety below:

*"Order Granting Motion for Leave to Proceed in
Forma Pauperis and Granting Petition for
Writ of Certiorari—March 5, 1962*

"On Petition For Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

"On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted, limited to the question of mootness. The case is transferred to the appellate docket as No. 766 and placed on the summary calendar.

"And it is further ordered that the duly certified copy of the transcript of the proceedings below which ac-

⁵ Petitioner says on page 23 of his brief "To allow the State thereby to immunize the sentence from constitutional attack runs counter to common sense and the spirit of habeas corpus." Petitioner has never suggested that the officials of the Parole Board sought to prevent him from attacking the validity of his sentence. Indeed, the Parole Board had no knowledge of his habeas corpus proceeding until after the parole had been granted. To follow petitioner's suggestion, as quoted above, would serve only to further crowd the dockets of the courts.

companyed the petition shall be treated as though filed in response to such writ."

In view of the language of this Court's order, counsel feel that it would be improper to make any argument on the second point raised in the petitioner's brief, for the reason that the Court has limited the issue in this case to the question of mootness. We would observe, however, that, in order to maintain a declaratory judgment action, it is necessary that there be an actual controversy between the parties. Counsel for the respondent are not advised that the petitioner himself is in any way objecting to his present situation.

CONCLUSION

"Law Addresses Itself to Actualities." ⁶

The foregoing is appropriate herein as a succinct statement of respondent's position in the premises. The actualities of the situation control the decision herein and not the theoretical abstractions presented by petitioner.

For the reasons stated, it is submitted that this cause is moot and that the judgment of the United States Court of Appeals for the Fourth Circuit should be affirmed.

Respectfully submitted,

ROBERT Y. BUTTON
Attorney General of Virginia

RENO S. HARP, III
Assistant Attorney General

Supreme Court - State Library Building
Richmond 19, Virginia

⁶*Griffin v. Illinois*, 351 U. S. 12, 23 (concurring opinion).

CODE OF VIRGINIA

§53-251. Eligibility for parole.—(1) Except as herein otherwise provided, every person convicted of a felony, and sentenced and committed, under the laws of this Commonwealth to the State Penitentiary, the State Penitentiary Farm, the State Industrial Farm for Women, or the Southampton Penitentiary Farm, or any of the State convict road camps, and any subsidiary institution, if a part of the major penal system, shall be eligible for parole after serving one-fourth of the term of imprisonment imposed, or after serving twelve consecutive years of the term of imprisonment imposed if one-fourth of the term of imprisonment imposed is more than twelve years. In case of terms of imprisonment to be served consecutively, the total time imposed shall constitute the term of the imprisonment; in the case of terms of imprisonment to be served concurrently, the longest term imposed shall be the term of imprisonment.

§53-253. Thorough investigation prior to release.—No person shall be released on parole by the Parole Board until it has made, or caused to be made, a thorough investigation as to the history, the physical and mental condition, and the character of the prisoner and his conduct, employment and attitude while in prison, nor until the Parole Board has determined that his release on parole will be compatible with the interests of the prisoner and of society.

§53-255. Period of parole.—The period of parole which shall be fixed by the Board may be greater than the unserved portion of the sentence actually imposed upon the paroled prisoner by the court or jury which fixed his sentence, but it shall not exceed the difference between the time served in confinement by the paroled prisoner and the maximum term established by law as punishment for the offense or offenses of which the prisoner was convicted.

§53-257. Parolees to comply with terms; furnishing copies.—Each parolee while on parole shall comply with such terms and conditions as may be prescribed by the Parole Board. When any prisoner is released on parole, the Director shall furnish such parolee, and the probation and parole officer having supervision of such parolee, a copy of the terms and conditions of the parole and any changes which may from time to time be made therein.

§53-258. Arrest and return of parolee to institution.—The Parole Board may at any time, in its discretion, upon information or a showing of a violation or a probable violation by any parolee of any of the terms or conditions upon which he was released on parole, issue, or cause to be issued, a warrant for the arrest and return of such parolee to the institution from which he was paroled, or to any other penal institution which may be designated by the Board. The Director may also at any time, in his discretion, upon information or a showing of a violation or probable violation by any parolee of any of the terms or conditions upon which such parolee was released on parole, issue, or cause to be issued, a warrant for the arrest and return of such parolee to the institution from which he was paroled, or to any other penal institution which may be designated by the Director. Each such warrant shall authorize all officers named therein to arrest and return such parolee to actual custody in the penal institution from which he was paroled, or to any other institution designated by the Parole Board or the Director, as the case may be.

§53-259. Arrest of parolee without warrant.—Any probation and parole officer may arrest a parolee without a warrant, or may deputize any other officer with power of arrest to do so, by a written statement setting forth that the

parolee has, in the judgment of such probation and parole officer, violated one or more of the terms or conditions upon which such parolee was released on parole. Such a written statement by a probation and parole officer delivered to the officer in charge of any State or local penal institution shall be sufficient warrant for the detention of the parolee.

§ 53-262. Revocation of parole; extension of terms and conditions of parole; further confinement.—Whenever any parolee is arrested and recommitted as hereinbefore provided, the Parole Board shall consider the case and act with reference thereto as soon as it may be conveniently possible. The Board, in its discretion, may revoke the parole and order the reincarceration of the prisoner for the unserved portion of the term of imprisonment originally imposed upon him, or it may reinstate the parole either upon such terms and conditions as were originally prescribed or as may be prescribed in addition thereto or in lieu thereof.

§ 53-263. Discharge of parolee.—When any paroled prisoner has faithfully performed all of the conditions and obligations imposed upon him by the terms of his parole for such time as shall satisfy the Parole Board that his final release is not incompatible with his welfare or that of society, the Parole Board may enter a final order of discharge and issue to the paroled prisoner a certificate of discharge.

§ 53-264. Release of prisoner subject to parole.—The Director of the Department of Welfare and Institutions shall release, or cause to be released, into the custody of the Parole Board or any of its probation and parole officers or the Director of Parole, any prisoner subject to parole under the laws of this State whenever directed so to do by the Parole Board or by the Director of Parole.

§ 53-296. Convicts previously sentenced to like punishment; additional confinement.—When a person convicted of an offense, and sentenced to confinement therefor in the penitentiary, is received therein, if it shall come to the knowledge of the Director of the Department of Welfare and Institutions that he has been sentenced to a like punishment in the United States prior to the sentence he is then serving, the Director of the Department of Welfare and Institutions shall give information thereof without delay to the Circuit Court of the city of Richmond. Such court shall cause the convict to be brought before it, to be tried upon an information filed, alleging the existence of records of prior convictions and the identity of the prisoner with the person named in each. The prisoner may deny the existence of any such records, or that he is the same person named therein, or both. Either party may, for good cause shown, have a continuance of the case for such reasonable time as may be fixed by the court. The existence of such records, if denied by the prisoner, shall be first determined by the court, and if it be found by the court that such records exist, and the prisoner says that he is not the same person mentioned in such records, or remains silent, his plea, or the fact of his silence, shall be entered of record, and a jury of bystanders shall be impaneled to inquire whether the convict is the same person mentioned in the several records. If they find that he is not the same person, he shall be remanded to the penitentiary; but if they find that he is the same person, or if he acknowledge in open court after being duly cautioned, that he is the same person, the court may sentence him to further confinement in the penitentiary for a period of not exceeding five years, if he has been once before sentenced in the United States to confinement in the penitentiary; but if he has been twice sentenced in the United States to such confinement, he may be sentenced to

be confined in the penitentiary for such additional time as the court trying the case may deem proper. This section, however, shall not apply to successive convictions of petit larceny.

UNIFORM ACT FOR OUT-OF-STATE PAROLEE SUPERVISION

(Code of Virginia, Section 53-289; Code of Georgia, Section 27-2701a)

Form of compact.—The form of the compact shall be substantially as follows:

A compact entered into by and among the contracting states, signatures hereto, with the consent of the Congress of the United States of America, granted by an act entitled "an act granting the consent of Congress to any two or more States to enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and for other purposes".

The contracting States solemnly agree:

(1) That it shall be competent for the duly constituted judicial and administrative authorities of a State party to this compact (herein called "sending State"), to permit any person convicted of an offense within such State and placed on probation or released on parole to reside in any other State party to this compact (herein called "receiving State"), while on probation or parole, if

(a) Such person is in fact a resident of or has his family residing within the receiving State and can obtain employment there;

(b) Though not a resident of the receiving State and not having his family residing there, the receiving State consents to such person being sent there.

Before granting such permission, opportunity shall be granted to the receiving State to investigate the home and prospective employment of such person.

A resident of the receiving State, within the meaning of this compact, is one who has been an actual inhabitant of such State continuously for more than one year prior to his coming to the sending State and has not resided within the sending State more than six continuous months immediately preceding the commission of the offense for which he has been convicted.

(2) That each receiving State will assume the duties of visitation of and supervision over probationers or parolees of any sending State and in the exercise of those duties will be governed by the same standards that prevail for its own probationers and parolees.

(3) That duly accredited officers of a sending State may at all times enter a receiving State and there apprehend and retake any person on probation or parole. For that purpose no formalities will be required other than establishing the authority of the officer and the identity of the person to be retaken. All legal requirements to obtain extradition of fugitives from justice are hereby expressly waived on the part of States party hereto, as to such persons. The decision of the sending State to retake a person on probation or parole shall be conclusive upon and not reviewable within the receiving State: Provided, however, that if at the time when a State seeks to retake a probationer or parolee there should be pending against him within the receiving State any criminal charge, or he should be suspected of having committed within such State a criminal offense, he shall not be retaken without the consent of the receiving State until discharged from prosecution or from imprisonment for such offense.

(4) That the duly accredited officers of the sending State will be permitted to transport prisoners being retaken

through any and all State parties to this compact, without interference.

(5) That the Governor of each State may designate an officer who, acting jointly with like officers of other contracting States, if and when appointed, shall promulgate such rules and regulations as may be deemed necessary to more effectively carry out the terms of this compact.

(6) That this compact shall become operative immediately upon its execution by any State as between it and any other State or States so executing. When executed it shall have the full force and effect of law within such State, the form of execution to be in accordance with the laws of the executing State.

(7) That this compact shall continue in force and remain binding upon each executing State until renounced by it. The duties and obligations hereunder of a renouncing State shall continue as to parolees or probationers residing therein at the time of withdrawal until retaken or finally discharged by the sending State. Renunciation of this compact shall be by the same authority which executed it, by sending six months' notice in writing of its intention to withdraw from the compact to the other States party hereto. (1938, p. 1001; Michie Code 1942, §4788a; R. P. 1948, §53-289.)

FEDERAL STATUTES

Section 2241. Power to Grant Writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial. June 25, 1948, c. 646, 62 Stat. 964; May 24, 1949, c. 139, §112, 63 Stat. 105.

* * *

Section 2254. State Custody; Remedies in State Courts

An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State

court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented. June 25, 1948, c. 640, 62 Stat. 967.

RULE OF THE SUPREME COURT OF THE UNITED STATES

Rule 49. Custody of Prisoners

1. Pending review of a decision refusing a writ of habeas corpus, or refusing a rule to show cause why the writ should not be granted, the custody of the prisoner shall not be disturbed, except by order of the court wherein the case is then pending, or of a judge or justices thereof, upon a showing that custodial considerations require his removal. In such cases, the order of the court or judge or justice will make appropriate provision for substitution so that the case will not become moot.

RULE OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Rule 25. Custody of Prisoners Pending a Review of Proceedings in Habeas Corpus

1. Pending review of a decision refusing a writ of habeas corpus, the custody of the prisoner shall not be disturbed.

SUPREME COURT OF THE UNITED STATES

No. 77.—OCTOBER TERM, 1962.

John R. Jones, Petitioner,

W. K. Cunningham, Jr.,
Superintendent of Vir-
ginia State Penitentiary.

On Writ of Certiorari to the
United States Court of
Appeals for the Fourth
Circuit.

[January 14, 1963.]

MR. JUSTICE BLACK delivered the opinion of the Court.

A United States District Court has jurisdiction under 28 U. S. C. § 2241 to grant a writ of habeas corpus "to a prisoner . . . in custody in violation of the Constitution . . . of the United States." The question in this case is whether a state prisoner who has been placed on parole is "in custody" within the meaning of this section so that a Federal District Court has jurisdiction to hear and determine his charge that his state sentence was imposed in violation of the United States Constitution.¹

In 1953 petitioner was convicted in a Virginia state court of an offense requiring confinement in the state penitentiary, and as this was his third such offense he was sentenced to serve 10 years in the state penitentiary. In 1961 he filed this petition for habeas corpus in the United States District Court for the Eastern District of Virginia, alleging that his third-offender sentence was based in part upon a 1946 larceny conviction which was invalid because his federal constitutional right to counsel had been denied at the 1946 trial. The District Court dismissed the petition but the Court of Appeals for the Fourth Circuit granted a certificate of probable cause and leave to appeal

¹ Parole in this case was granted while petitioner's appeal was pending in the Court of Appeals.

in forma pauperis. Shortly before the case came on for oral argument before the Court of Appeals petitioner was paroled by the Virginia Parole Board. The parole order placed petitioner in the "custody and control" of the Parole Board and directed him to live with his aunt and uncle in LaFayette, Georgia. It provided that his parole was subject to revocation or modification at any time by the Parole Board and that petitioner could be arrested and returned to prison for cause. Among other restrictions and conditions, petitioner was required to obtain the permission of his parole officer to leave the community, to change residence, or to own or operate a motor vehicle. He was further required to make monthly reports to his parole officer, to permit the officer to visit his home or place of employment at any time, and to follow the officer's instructions and advice. When petitioner was placed on parole, the Superintendent of the Virginia State Penitentiary, who was the only respondent in the case, asked the Court of Appeals to dismiss the case as moot since petitioner was no longer in his custody. Petitioner opposed the motion to dismiss but, in view of his parole to the custody of the Virginia Parole Board, moved to add its members as respondents. The Court of Appeals dismissed, holding that the case was moot as to the Superintendent because he no longer had custody or control over petitioner "at large on parole." It refused to permit the petitioner to add the Parole Board members as respondents because they did not have "physical custody" of the person of petitioner and were therefore not proper parties. 294 F. 2d 608. We granted certiorari to decide whether a parolee is "in custody" within the meaning of 28 U. S. C. §. 2241 and is therefore entitled to invoke the habeas corpus jurisdiction of the United States District Court. 369 U. S. 809.

The habeas corpus jurisdictional statute implements the constitutional command that the writ of habeas corpus

be made available.² While limiting its availability to those "in custody," the statute does not attempt to mark the boundaries of "custody" nor in any way other than by use of that word attempt to limit the situations in which the writ can be used. To determine whether habeas corpus could be used to test the legality of a given restraint on liberty, this Court has generally looked to common-law usages and the history of habeas corpus both in England and in this country.³

In England, as in the United States, the chief use of habeas corpus has been to seek the release of persons held in actual, physical custody in prison or jail. Yet English courts have long recognized the writ as a proper remedy even though the restraint is something less than close physical confinement. For example, the King's Bench as early as 1722 held that habeas corpus was appropriate to question whether a woman alleged to be the applicant's wife was being constrained by her guardians to stay away from her husband against her will.⁴ The test used was simply whether she was "at her liberty to go where she please[d]."⁵ So also, habeas corpus was used in 1763 to require the production in court of an indentured 18-year-old girl who had been assigned by her master to another man "for bad purposes."⁶ Although the report indicates no restraint on the girl other than the covenants of the indenture, the King's Bench ordered that she "be discharged from all restraint, and be at liberty to go where she will." And more than a century ago an Eng-

² "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U. S. Const., Art. I, § 9.

³ See, e. g., *McNally v. Hill*, 293 U. S. 131, 136 (1934); *Ex parte Parks*, 93 U. S. 18 (1876).

⁴ *Rex v. Clarkson*, 1 Stra. 444, 93 Eng. Rep. 625 (K. B. 1722).

⁵ *Id.*, at 445, 93 Eng. Rep., at 625.

⁶ *Rex v. Delaval*, 3 Burr. 1434, 97 Eng. Rep. 913 (K. B. 1763).

⁷ *Id.*, at 1437, 97 Eng. Rep., at 914.

lish court permitted a parent to use habeas corpus to obtain his children from the other parent, even though the children were "not under imprisonment, restraint, or duress of any kind." These examples show clearly that English courts have not treated the Habeas Corpus Act of 1679, 31 Car. II. c. 2—the forerunner of all habeas corpus acts—as permitting relief only to those in jail or like physical confinement.

Similarly, in the United States the use of habeas corpus has not been restricted to situations in which the applicant is in actual physical custody. This Court itself has repeatedly held that habeas corpus is available to an alien seeking entry into the United States,⁹ although in those cases each alien was free to go anywhere else in the world. "[H]is movements," this Court said, "are restrained by authority of the United States, and he may by habeas corpus test the validity of his exclusion."¹⁰ Habeas corpus has also been consistently regarded by lower federal courts as the appropriate procedural vehicle for questioning the legality of an induction or enlistment into the military service.¹¹ The restraint, of course, is clear in such cases, but it is far indeed from the kind of "present physical custody" thought by the Court of Appeals to be required. Again, in the state courts, as in England, habeas corpus has been widely used by parents disputing

⁹ *Earl of Westmeath v. Countess of Westmeath*, as set out in a reporter's footnote in *Lyons v. Blenkin*, 1 Jac. 245, 264, 37 Eng. Rep. 842, 848 (Ch. 1821); accord *Ex parte McClellan*, 1 Dow. 81 (K. B. 1831).

¹⁰ *E. g.*, *Brownell v. Tom We Shung*, 352 U. S. 180, 183 (1956); *Shaughnessy v. United States ex rel. Mezei*, 345 U. S. 206 (1953); *United States ex rel. Knauff v. Shaughnessy*, 338 U. S. 537 (1950); *United States v. Jung Ah Lung*, 124 U. S. 621, 626 (1888).

¹¹ *Shaughnessy v. United States ex rel. Mezei*, *supra* note 10, at 213.

¹² *E. g.*, *Ex parte Fabiani*, 105 F. Supp. 139 (D. C. E. D. Pa. 1952); *United States ex rel. Steinberg v. Graham*, 57 F. Supp. 938 (D. C. E. D. Ark. 1944).

over which is the fit and proper person to have custody of their child,¹² one of which we had before us only a few weeks ago.¹³ History, usage, and precedent can leave no doubt that, besides physical imprisonment, there are other restraints on a man's liberty, restraints not shared by the public generally, which have been thought sufficient in the English-speaking world to support the issuance of habeas corpus.

Respondent strongly urges upon us that however numerous the situations in which habeas corpus will lie prior decisions of this Court conclusively determine that the liberty of a person released on parole is not so restrained as to permit the parolee to attack his conviction in habeas corpus proceedings. In some of those cases, upon which the Court of Appeals in this case also relied, the petitioner had been completely and unconditionally released from custody;¹⁴ such cases are obviously not controlling here where petitioner has not been unconditionally released. Other cases relied upon by respondent held merely that the dispute between the petitioner and the named respondent in each case had become moot because that particular respondent no longer held the petitioner in his custody.¹⁵ So here, as in the cases last mentioned

¹² E. g., *Boardman v. Boardman*, 135 Conn. 121, 138 (1948); *Barlow v. Barlow*, 141 Ga. 535, 536-537 (1914); *In re Swall*, 36 Nev. 171, 174 (1913) ("[T]he question of physical restraint need be given little or no consideration where a lawful right is asserted to retain possession of the child.") See also *In re Hollopeter*, 52 Wash. 41 (1909) (husband held entitled to release of his wife from restraint by her parents); *In re Chace*, 26 R. I. 351, 358 (1904) (wife held entitled to husband's society free of restraint by his guardian).

¹³ *Ford v. Ford*, 371 U. S. 187 (1962).

¹⁴ *Parker v. Ellis*, 362 U. S. 574 (1960); *Zimmerman v. Walker*, 319 U. S. 744 (1943); *Tornello v. Hudspeth*, 318 U. S. 292 (1943).

¹⁵ *United States ex rel. Lynn v. Downer*, 322 U. S. 756 (1944); *United States ex rel. Innes v. Crystal*, 319 U. S. 755 (1943); *Weber v. Squier*, 315 U. S. 810 (1942).

when the petitioner was placed on parole, his cause against the Superintendent of the Virginia State Penitentiary became moot because the superintendent's custody had come to an end, as much as if he had resigned his position with the State. But it does not follow that this petitioner is wholly without remedy. His motion to add the members of the Virginia Parole Board as parties respondent squarely raises the question, not presented in our earlier cases, of whether the Parole Board now holds the petitioner in its "custody" within the meaning of 28 U. S. C. § 2241 so that he can by habeas corpus require the Parole Board to point to and defend the law by which it justifies any restraint on his liberty.

The Virginia statute provides that a paroled prisoner shall be released "into the custody of the Parole Board,"¹⁰ and the parole order itself places petitioner "under the custody and control of the Virginia Parole Board." And in fact, as well as in theory,¹¹ the custody and control of the Parole Board involves significant restraints on petitioner's liberty because of his conviction and sentence, which are in addition to those imposed by the State upon the public generally. Petitioner is confined by the parole order to a particular community, house, and job at the sufferance of his parole officer. He cannot drive a car without permission. He must periodically report to his parole officer, permit the officer to visit his home and job at any time, and follow the officer's advice. He is admonished to keep good company and good hours, work regularly, keep away from undesirable places, and live a clean, honest, and temperate life. Petitioner must not only faithfully obey these restrictions and conditions but

¹⁰ Va. Code Ann. § 53-264.

¹¹ See *Anderson v. Corall*, 263 U. S. 193, 196 (1923). ("While [parole] is an amelioration of punishment, it is in legal effect imprisonment.") von Hentig, Degrees of Parole Violation and Graded Remedial Measures, 33 J. Crim. L. & Criminology 363 (1943).

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he must live in constant fear that a single deviation, however slight, might be enough to result in his being returned to prison to serve out the very sentence he claims was imposed upon him in violation of the United States Constitution. He can be rearrested at any time the Board or parole officer believes he has violated a term or condition of his parole,¹² and he might be thrown back in jail to finish serving the allegedly invalid sentence with few, if any, of the procedural safeguards that normally must be and are provided to those charged with crime.¹³ It is not relevant that conditions and restrictions such as these¹⁴ may be desirable and important parts of the rehabilitative process; what matters is that they significantly restrain petitioner's liberty to do those things which in this country free men are entitled to do. Such restraints are enough to invoke the help of the Great Writ. Of course, that writ always could and still can reach behind prison walls and iron bars. But it can do more. It is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty. While petitioner's parole releases him from immediate physical imprisonment, it imposes conditions which significantly confine and restrain his freedom; this is enough to keep him in the "custody" of the members of the Virginia Parole Board within the meaning of the habeas corpus statute; if he can prove his allegations this custody is in violation of the

¹² Va. Code Ann. §§ 53-258, 53-259. In fact, all the Board has to find is that "there was a probable violation."

¹³ Even the condition which requires petitioner not to violate any penal laws or ordinances, at first blush innocuous, is a significant restraint because it is the Parole Board members or the parole officer who will determine whether such a violation has occurred.

¹⁴ The conditions involved in this case appear to be the common ones. See *Guardian: The Parole Process*, 12-16 (1959).

Constitution, and it was therefore error for the Court of Appeals to dismiss his case as moot instead of permitting him to add the Parole Board members as respondents.

Respondent also argues that the District Court had no jurisdiction because the petitioner had left the territorial confines of the district. But this case is not like *Ahrens v. Clark*, 335 U. S. 188 (1948), upon which respondent relies, because in that case petitioners were not even detained in the district when they originally filed their petition. Rather, this case is controlled by our decision in *Ex parte Endo*, 323 U. S. 283, 304-307 (1944), which held that a District Court did not lose its jurisdiction when a habeas corpus petitioner was removed from the district so long as an appropriate respondent with custody remained. Here the members of the Parole Board are still within the jurisdiction of the District Court, and they can be required to do all things necessary to bring the case to a final adjudication.

The case is reversed and remanded to the Court of Appeals with directions to grant petitioner's motion to add the members of the Parole Board as respondents and proceed to a decision on the merits of petitioner's case.

Reversed.